

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
UNITED STATES OF AMERICA,
:
Plaintiff,
:
-and-
:
THE VULCAN SOCIETY, INC., for itself and on behalf of
its members, and MARCUS HAYWOOD, CANDIDO
NUÑEZ and ROGER GREGG, individually and on behalf
of a class of all others similarly situated,
:
Plaintiffs-Intervenors,
:
-against-
:
THE CITY OF NEW YORK,
:
Defendant.
:
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**SPECIAL MASTER’S
REPORT NO. 7**

07-cv-2067 (NGG)(RLM)

MARY JO WHITE, Special Master.

The Special Master submits this report pursuant to paragraph 4 of the Court’s June 1, 2010 Order Appointing Special Master (the “Appointment Order”). (Dkt. No. 448, ¶ 4). The Appointment Order requires the Special Master to submit a report at least every 90 days after the parties begin the joint development of a new firefighter eligibility exam (the “New Test”). The Special Master’s last report was submitted on July 25, 2011. This report describes the completion of a key aspect of the test development process – the administration of a preliminary experimental form of the test to incumbent firefighters – as well as the upcoming phases.

The New Test will be a computer-based test (“CBT”) and is scheduled to be administered from January 3 to February 3, 2012. The experts continue to caution that the project schedule could change depending on the results of the validation studies discussed below. Also, this timeline assumes that the City will use the Candidate Physical Ability Test (“CPAT”) in the New Test and in the same manner (scored on a pass-fail basis) it did when selecting candidates who took Exam 6019. As the Court is aware, there has been no finding that the physical component of the FDNY’s selection procedure is violative of Title VII or any other law.

Discussions among the parties and their experts about whether there should be any changes to the physical portion of the firefighter entrance exam continued into this reporting period. As previously reported to the Court, the United States and the Vulcan Society had proposed that a criterion validation study be performed for the physical component of the FDNY’s selection procedure. (*See* Dkt. No. 691 at 2 n.2). The Special Master then agreed, following a request made by the United States and consented to by all the parties, to defer consideration of this issue, including the threshold question of whether the physical component of the exam falls within the Special Master’s mandate, until after the experts analyze the data from the CBT criterion-related validity study.¹ The United States’ expert has represented his belief that conducting this study within the current project timeline is feasible, absent other delays.

¹ The validation methods being used in this test development effort are described later in this report, *see infra* at 3-5, as well as in the Special Master’s prior report to the Court. (*See* Dkt. No. 691 at 4-5).

I. Progress Towards Development of the New Test

As previously reported to the Court, the current project plan includes six milestones: (i) job analysis; (ii) test development, which encompasses test design, development of exam content, content validation and pilot testing, criterion-related and construct validation, and development of various test forms and equivalency studies;² (iii) test administration; (iv) analysis and scoring; (v) computation of final test results; and (vi) preparation of final technical report. At the Special Master's instruction, the parties certify in writing at various points across these milestones that the test development process should proceed to the next phase in the project plan. To date, all parties – the United States, the Vulcan Society and the City – have agreed that the development process should proceed. Thus, the experts have now commenced the final steps of the test development phase – criterion-related and construct validation and the development of various test forms and equivalency studies.³

A. Test Development

² The equivalency studies are also described below. *See infra* at 5.

³ To facilitate this progress, the Special Master continues to hold scheduled standing weekly telephonic conferences with the parties. These conferences are held (or not) based on the Special Master's assessment of the need to convene the parties. Since her last report, additional conferences were held on July 27th, August 5th, 11th and 18th; and September 5th, 20th, and 27th. At the Special Master's direction, certain of the conferences were conducted by her partner, Mary Beth Hogan. One earlier call, on July 19th, was conducted by fellow Debevoise lawyers Philip Fortino and Chinelo Dike-Minor. In addition, on September 7, 2011, the Special Master hosted a fifth joint expert-counsel meeting at the offices of her law firm. The experts also continue to hold a standing weekly telephonic conference (sometimes virtual meetings) with each other. Since the Special Master's previous report, the experts have held telephonic conferences on July 28th, August 5th, 9th, 12th, 16th and 22nd, September 1st, 9th, 22nd, 23rd, 26th, and 28th. In addition, they have held in-person meetings on August 24th, 25th, and September 15th.

1. Validation

As previously reported to the Court, the experts are using three different approaches to confirm the validity of the New Test – content, criterion and construct validity. In summary:

- **Content Validity:** As discussed more fully in prior reports, content validation seeks to assess validity using information learned from subject matter experts (“SMEs”) knowledgeable in the job – usually firefighters, their supervisors and/or trainers. This information may be gleaned from the job analysis process, as well as in additional sessions with SMEs. On July 22nd, twenty-nine firefighters and officers participated in a session during which they provided information relevant to assessing the exam’s content validity, including their views on the extent to which certain abilities are important for performing specified test sections. (*See* Dkt. No. 691 at 4-5).⁴
- **Criterion Validation:** Criterion validation is a validation technique that seeks to measure the correlation between performance on the New Test and performance on the job. From September 14th to 17th, the experts administered a refined version of the test to 749 incumbent firefighters as part of the criterion validation study.⁵ The experts have now begun to perform statistical analyses of the data. (*See id.* at 5-6).
- **Construct Validation:** This third validation method seeks to show a relationship between the abilities being tested in the current test and a different established test, *i.e.*, a “marker test,” which has known validity with respect to the ability being tested. (*See id.* at 6-7). The version of the New Test administered to the incumbents incorporated “marker tests.” As part of their ongoing statistical analyses, the experts will assess, among other things, whether test takers’ performance on the marker tests correlates with questions reflecting the same or similar abilities being tested in the New Test.⁶

⁴ In addition, the experimental test was also administered to the participants in order to elicit feedback on any technical, administrative, or other issues associated with the New Test.

⁵ On September 13th, the City’s experts set up and trained proctors for these sessions.

⁶ As previously reported, any data obtained during these validation steps will be kept confidential and used exclusively for the purposes of conducting the study.

Each aspect of the validation process has required the cooperation of incumbent members of the FDNY. That cooperation has, to date, been excellent, for which the Special Master and the parties are very appreciative. For the test sessions on September 14th to the 17th, an extraordinary 99% of those invited and not on leave attended and participated in the criterion study. Of the 808 incumbent firefighters invited to participate in the study, only 59 were unable to attend. Of the 749 incumbent firefighters scheduled, 742 participated.

In addition to the incumbent firefighters who participated in the study, the Special Master would like to commend Chief Michael Gala of the FDNY, the United Firefighters Association (“UFA”), and the United Firefighters Officers Association (“UFOA”) for their efforts in connection with the criterion study. At the Special Master’s request, the UFA drafted and distributed a letter to its membership, encouraging their cooperation in the study. This outreach was very important to the success of the study, as were Chief Gala’s efforts in distributing the letter, following-up with incumbents to ensure their attendance, and overall assistance in scheduling and coordinating the test administration sessions.

2. Development of Various Test Forms and Equivalency Studies

In the next phase of the test development effort, the City’s expert will draw upon the test content in the experimental version of the New Test to create alternate forms that are equivalent in substance and difficulty that will be used in the upcoming administration of the exam to actual job candidates. The experts have expressed the view, with which the Special Master and parties agree, that creating and using these alternate forms is necessary to ensure that the test content remains secure.

Once the alternate forms are created, the experts will perform equivalency studies to ensure that these forms are equivalent in substance and difficulty to each other and to the version of the New Test used in the criterion study. The equivalency studies will be conducted using methods generally accepted by psychometric experts. These analyses will allow the experts to document and demonstrate that all candidates took tests of equal difficulty.

B. Tutorial in Connection with Test Administration

Prior to and during the administration of the New Test, a tutorial will be made available to candidates to help ensure that candidates: (i) have the opportunity to familiarize themselves with taking a computer-based test; and (ii) understand the type of content and questions to be included on the New Test. Candidates have been and will be informed of the tutorial through the Second Amended Notice of Exam, FDNY and Department of Citywide Administrative Services (“DCAS”) websites, and in the test admission notices that they will receive.

II. Updating *Amici*⁷

The Special Master continues to hold bi-weekly conferences with the union representatives, Chief Gala, and the parties and their experts in order to provide updates on the status of the test development effort. Since the last report, calls have been held on August 12th, 26th, September 9th and September 22nd.

⁷ As noted, *Amici* are the UFOA and UFA. The meetings and conferences held with *Amici* prior to this report are described in the Special Master’s prior reports.

III. Fees

On September 3rd, the Court approved the Special Master's Application for Approval of Proposed Budget for Special Master's Expert Consultant, which projected monthly fees of between \$7,000 to \$17,000. (Dkt. Nos. 516, 519). The Special Master has submitted her expert's fees, which as reported in the Statements of Fees and Expenses, have fallen either under or within that projected range. Her expert, Dr. Pittman, has received approved expenses and fees from the City for her fees and expenses through July. (Dkt. No. 702).

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The Special Master thanks the parties, experts, *Amici*, and Chief Gala of the FDNY for their past and continued assistance and cooperation in this joint effort. All engaged in this process recognize both the importance and difficulty in developing a valid and legally compliant New Test that will serve to select new firefighters for the City. To do so requires the coordination, discussion, and consideration of the views and input of several interested parties. The Special Master remains substantially satisfied with the progress made to date by the parties and their experts towards developing the New Test. We will continue to emphasize to the parties the need for and importance of vigorous and sustained efforts towards completion of the New Test.

Pursuant to the Appointment Order, the Special Master will submit her next report within 90 days from today. (Appointment Order, ¶ 4).

/s/ Mary Jo White

Mary Jo White

Dated: September 29, 2011